Feb 28 2000

(27)

No. 99-699

Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

IN THE
Supreme Court of The United States
OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondents.

On Writ of Certiorari
To the Supreme Court of New Jersey

BRIEF OF PUBLIC ADVOCATE OF THE UNITED STATES, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, COMMITTEE TO PROTECT THE FAMILY FOUNDATION, CONCERNED WOMEN FOR AMERICA, AND NATIONAL CRIMINAL JUSTICE COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

Attorneys for
Amici Curiae

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070
**Counsel of Record*
February 28, 2000

34 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT

INTRODUCTION 3

I. THIS COURT'S DECISION IN HURLEY REQUIRES REVERSAL OF THE NEW JERSEY RULING 6

II. THE DECISION BELOW VIOLATES THE RIGHT TO ASSEMBLE PROTECTED BY THE FIRST AMENDMENT 10

III. THE DECISION BELOW ERRONEOUSLY EXPANDS THE CONSTITUTIONALLY-PERMISSIBLE LIMITS ON FREEDOM OF ASSOCIATION 17

CONCLUSION 29

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION
Amendment I ..... 3, *passim*
Amendment XIV 14

CASES
Bell v. Maryland, 378 U.S. 226 (1964) 28
Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) ..... 3, *passim*
Bowers v. Hardwick, 478 U.S. 186 (1986) 23
Burson v. Freeman, 504 U.S. 191 (1992) 20
Cox v. Louisiana, 379 U.S. 536 (1965) 17
Dale v. Boy Scouts of America, 160 N.J. 562, 734 A. 2d 1196 (1999) ..... 4, *passim*
DeJonge v. Oregon, 299 U.S. 353 (1937) ..... 13, *passim*
Edwards v. South Carolina, 372 U.S. 229 (1963) 27
Griffin v. Strong, 983 F. 2d 1544 (10th Cir. 1993) 11
Hague v. CIO, 307 U.S. 496 (1939) 13
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ..... 2, passim
L.P. v. Oubre, 547 So. 2d 1320 (La. 1989) 6
Lourim v. Swensen, 328 Or. 380, 977 P.2d 1157 (1999) . 6
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 28
NAACP v. Alabama, 357 U.S. 449 (1958). 15, 18
NAACP v. Button, 371 U.S. 415 (1963) 15, 16, 19
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 15
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988). 3, 9
Palmer v. Thompson, 403 U.S. 217 (1971) 28
Roberts v. United States Jaycees, 468 U.S. 609 (1984) ..... 3, *passim*

Page

Romer v. Evans, 517 U.S. 620 (1996) 22
Rosenberger v. University of Virginia, 515 U.S. 819 (1995) 22
Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997) 11
Shapiro v. Thompson, 394 U.S. 618 (1969) 19
Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991) 19
Thomas v. Collins, 323 U.S. 516 (1945) ..... 14, *passim*
United States v. Cruikshank, 92 U.S. 542 (1876) ... 13, 14
Winik-Nystrup v. Manufacturers Life Insurance Co., 8 F. Supp. 2d 1 (D. Conn. 1998) 11

MISCELLANEOUS
Article XVI of the August 16, 1776 Constitution of Pennsylvania, reprinted in Sources of Our Liberties 331 (Perry, ed., American Bar Foundation, 1972) 13
Ashford, N., "Equal Rights, Not Gay Rights," Independent Gay Forum 28
Bell, A.P. and Weinberg, M.S., *Homosexualities: A Study of Diversity Among Men and Women* (New York: Simon & Shuster, 1978). 24, 25, 26
Bernstein, "Sex Discrimination Laws Versus Civil Liberties," 99 *Univ. of Chi. L. Forum* __ ... 22, 28
Blackstone, W., *III Commentaries on the Laws of England*, Ch. 9, Sec. 6 (1768). 3
Boyle, P., *Scout's Honor* (Rockland, Calif., Prima Publishing, 1994). 5, 26
Gallup, G., "Attitudes Toward Homosexuals and Evolutionary Theory: The Role of Evidence," 17 Ethology and Sociobiology 281 (1996) 5, 26

Page

Gephard,. P. and Johnson, A.P., *The Kinsey Data: Marginal Tabulations of the 1958-63 Interviews Conducted by the Institute for Sex Research* (Indiana University Press: Bloomington, Ind., 1979) .. 25

Jay, K., and Young, A., *The Gay Report* (New York: Summit Books, 1979) 24

Masters, W., and Johnson, V., *Human Sexual Inadequacy* (Boston: Little, Brown and Company, 1970) 25

Reisman, J., "Partner Solicitation Language As A Reflection Of Male Sexual Orientation" (Collected Papers from the NARTH Annual Conference, Saturday, 29 July 1995) 24

Rueda, E., *The Homosexual Network: Private Lives and Public Policy* (Old Greeenwich, Conn.: The Derbin Adair Company, 1982) 5

Sincere, R. "New Jersey Supreme Court Ruling on Boy Scouts Threatens Freedom for All — Including Gays," *Wall Street Journal* (August 11, 1999) 28

No. 99-699

IN THE

Supreme Court of The United States

OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari
To the Supreme Court of New Jersey

BRIEF OF PUBLIC ADVOCATE OF THE UNITED STATES, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, COMMITTEE TO PROTECT THE FAMILY FOUNDATION, CONCERNED WOMEN FOR AMERICA, AND NATIONAL CRIMINAL JUSTICE COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The amici curiae, Public Advocate of the United States, Lincoln Institute for Research and Education, Committee to Protect the Family Foundation, Concerned Women for America, and National Criminal Justice Council (a project of Citizens United Foundation), are nonprofit educational organizations sharing a common interest in the proper

construction of the Constitution and laws of the United States.[1] All of the *amici* were established within the past 25 years for public education purposes related to participation in the public policy process, and are tax-exempt under section 501(c)(3) of the Internal Revenue Code, except for Public Advocate of the United States, which is exempt under IRC section 501(c)(4).

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, most of the *amici* have conducted research on other issues involving constitutional interpretation and filed amicus curiae briefs in other federal litigation, including matters before this Court, involving constitutional issues. Public Advocate of the United States and Lincoln Institute for Research and Education filed an *amicus curiae* brief in support of the Boy Scouts' Petition for Certiorari herein.[2]

SUMMARY OF ARGUMENT

The decision below is in conflict with this Court's unanimous decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). It

---

[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

misapplies this Court's rulings in Roberts v. United States Jaycees, 468 U.S. 609 (1984), Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987), and New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), and it also conflicts with this Court's rulings recognizing a constitutional right of association independent of "intimate" and "expressive" associations. Finally, it conflicts with this Court's rulings limiting governments to the imposition of content-neutral time, place and manner regulations upon the right of the people peaceably to assemble. If allowed to stand, the decision below will not only spawn confusion regarding the proper application of the First Amendment to claims of freedom of association, but will jeopardize fundamental constitutional principles long established by this Court.

ARGUMENT

INTRODUCTION

In a dramatic departure from the common law principle laying at the foundation of modern public accommodations laws, the Supreme Court of New Jersey extended that state's public accommodation law to impose an unprecedented legal obligation upon the Boy Scouts of America.

As this Court pointed out in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 571 (1995), modern public accommodation laws have a "venerable history," stretching back to the common law rule requiring an innkeeper to serve all travelers that come his way unless he had "good reason" not to. *See* III W. Blackstone, Commentaries on the Laws of England, Ch. 9, Sec. 6 (1768). Through the years, legislatures have extended this common law rule to reach

additional **business** entities besides innkeepers, and to narrow the range of "good reasons" justifying refusal of service to their **customers**. Hurley, *supra*, 515 U.S. at 571-72 (emphasis added).

Until now, this common law principle of equal treatment has been confined to entities that are **commercial** in nature and purpose. *E.g.*, Roberts v. United States Jaycees, 468 U.S.609, 631-40 (1984) (O'Connor, J., concurring), and has been limited to affording equal access to persons desirous of **receiving** the entities' full range of goods and services to accomplish business purposes. *E.g.*, Bd. of Directors of Rotary Int'l. v. Rotary Club, 481 U.S. 537, 541-43 (1987). In this case, however, the New Jersey Supreme Court has, first of all, stretched that state's public accommodation law to "root out" discrimination in a faith-based community service organization simply because its outreach is "broad," and also because it has government relationships such as its historic involvement with the President of the United States. *See* Dale v. Boy Scouts of America, 160 N.J. 562, 734 A. 2d 1196 (1999) at 29a-30a.[3]

The case below did not involve a boy scout who sought merely to **receive** the benefits of scouting. The New Jersey Supreme Court has imposed upon the Boy Scouts a duty to accept an avowed homosexual activist who seeks to **provide** those benefits as an assistant scoutmaster. By twisting the state's public accommodation law into the service of a homosexual adult who would be a provider of the services of the Boy Scouts, the New Jersey justices have transformed the state's public accommodation law into a type of employment

[3] The opinion of the Supreme Court of New Jersey on review herein is included at pages 1a-101a of Appendix A to the Petition for a Writ of Certiorari herein. Further references to that opinion in this brief will be designated, with the appropriate appendix page reference, as "N.J. Op."

discrimination statute applicable to unpaid volunteers. In doing so, they have demonstrated disregard for the kinds of exceptions normally attached to employment discrimination laws, such as those permitting bona fide occupational requirements, which would clearly be appropriate in the case of the Boy Scouts, where adult scoutmasters are placed in positions of authority and close contact with young boys.

If the ruling below were upheld, the Boy Scouts of America, their affiliates and their volunteers would be unfairly and unreasonably exposed to increased risks of liability, and the boy scouts, themselves, would be unnecessarily exposed to risks of harm and injury. These heightened risks — of injury and of legal liability — are especially noteworthy in this case. Forcing the Boy Scouts to accept avowed homosexuals as adult leaders would increase the risk of sexual molestation of young boys, given the fact that certain homosexual activists encourage legalizing sex with all persons, including minors. E. Rueda, *The Homosexual Network: Private Lives and Public Policy*, pp. 202-203 (Old Greeenwich, Conn.: The Derbin Adair Company, 1982). Additionally, there is evidence that the proportion of homosexual pedophiles is considerably higher than that of heterosexual pedophiles, and by one estimate, homosexual teachers are 90 to 100 times more likely to become sexually involved with their students than are heterosexuals. *See, e.g.*, G. Gallup, "Attitudes toward Homosexuals and Evolutionary Theory: The Role of Evidence," 17 *Ethology and Sociobiology* 281-84 (1996).

Indeed, the Boy Scout setting appears to be an ideal place for certain pedophiles, especially male homosexual pedophiles, to pursue potential boy victims, with overnight camp-outs in secluded locations providing ample time and opportunity for intimate contact. *See* P. Boyle, *Scout's Honor* 70-71 (Rocklin, Calif., Prima Publishing: 1994). If such molestation were to

occur, the Boy Scouts would likely bear the risk of legal liability for such conduct. *See, e.g.*, L.P. v. Oubre, 547 So. 2d 1320 (La. 1989); Lourim v. Swensen, 328 Or. 380, 977 P.2d 1157 (1999).

Having ignored both the common law principles underlying the public accommodation laws and the possible consequences of a ruling forcing the Boy Scouts to accept a homosexual activist as a scoutmaster, the New Jersey Supreme Court also erroneously disposed of the Boy Scout's constitutional claim of freedom of association. Indeed, that court paid no attention to the true legacy of freedom of association, neglecting even to address the relevant constitutional text establishing that freedom, and misapplying this Court's precedents upholding that freedom.

I. THIS COURT'S DECISION IN HURLEY REQUIRES REVERSAL OF THE NEW JERSEY RULING.

The decision below directly conflicts with this Court's unanimous decision in Hurley, *supra*, holding that requiring private organizers of a parade to permit a gay rights group to march in the parade violated the organizers' First Amendment rights. Ignoring the balancing test applied in Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court determined that Massachusetts' public accommodation law, as applied to South Boston's St. Patrick's Day Parade, "violates the fundamental rule of protection under the First Amendment, that a **speaker** has the autonomy to choose the content of his message." Hurley, *supra*, 515 U.S. at 573 (emphasis added).

The rationale in Hurley applies even more strongly to this case. As this Court observed in Hurley, by extending the

state's nondiscrimination law to marchers in a parade, the Massachusetts Supreme Judicial Court had applied the state's public accommodation law "in a **peculiar** way ... essentially requiring petitioners [the parade organizers] to alter the expressive content of their parade." *Id.*, 515 U.S. at 572 (emphasis added).

In this case, the Supreme Court of New Jersey has applied that state's public accommodation law in an **even more peculiar** way. Not merely requiring the Boy Scouts to admit a homosexual boy to scout **membership**, without regard for its policy against open homosexual expression, the New Jersey ruling requires the Boy Scouts to admit an avowed homosexual activist to scouting **leadership**. N.J. Op., pp. 65a-67a. By analogy to Hurley, the New Jersey ruling is tantamount to forcing an "assistant parade leader" upon the St. Patrick's Day parade organizers, with authority to influence the **whole** parade, not just a bunch of marchers with a message confined to one part of it. Yet, this Court in Hurley found the lesser intrusion upon "speaker autonomy" an impermissible encroachment upon the parade organizers' First Amendment rights.

In an attempt to avoid the rule in Hurley, the New Jersey Supreme Court distinguished "Boy Scout leadership" from a "parade," claiming that the latter was a "form of 'pure speech,'" whereas the former was something deserving less constitutional protection. N.J. Op., pp. 65a-66a. Just the opposite is true. A parade, such as the one in Hurley, is a once-a-year event, whereas Boy Scouting is a daily commitment with continuous speech. Indeed, the person being excluded from the Boy Scouts in this case is not just another participant in a single annual march down the streets of Boston, but rather a dedicated adult who, by virtue of his role as scoutmaster, had "no other reason to join apart from leadership in service to boys.'" N.J. Op., p. 11a.

In a further attempt to escape the shackles of Hurley, the New Jersey Supreme Court fashioned a Houdini-like escape, disingenuously asserting that the respondent had never promoted homosexuality as a Boy Scout leader, and that there was no indication that respondent intended to "teach" anything whatsoever about homosexuality as a scout leader." N.J. Op., pp. 65a-66a. This turns a blind eye to the fact that respondent's homosexual lifestyle had been hidden, and that it was his emergence as a publicly proclaimed homosexual activist and participant in a seminar promoting homosexuality among teenagers that gave rise to his dismissal from the Boy Scouts. It would be reasonable to infer, as the Boy Scout authorities did, that he would use his assistant scoutmaster position to promote the homosexual lifestyle to young boy scouts. Furthermore, under Hurley, respondent's very "coming out" and publicized activity as a homosexual leader constitutes speech antithetical to the Boy Scouts' message, compromising the Boy Scouts' right to autonomy over that message. *See* Hurley, *supra,* 515 U.S. at 576.

To this realistic concern for the welfare of young boys, the New Jersey court cast a callous glance, based, no doubt, in part on its disapproval of the Boy Scouts' message. *See* N.J. Op., pp. 58a-62a, 64a-67a. Clearly, the Supreme Court of New Jersey erred. In Hurley, for example, this Court scrupulously avoided a decision based on its approval or disapproval of either party's message, relying on the time-honored free speech principle that "shield[s] ... those choices of content that in someone's eyes are misguided, or even hurtful." Hurley, *supra,* 515 U.S. at 574.

The same standard of review and analysis employed by this Court in Hurley should obtain in this case. Not only is respondent's avowed homosexual identity inconsistent with the Boy Scouts' external message, his role as a Boy Scout leader

would interfere with the **internal** communication of that message. As this Court observed in Hurley, marchers in a "parade" make "some sort of collective point ... to each other" as well as "to bystanders along the way." *Id.*, 515 U.S. at 568. This is all the more true with regard to organizers of the parade. After all, the right of "speaker autonomy" does not turn on the existence of "a narrow succinctly articulable message" to outsiders, but upon the absolute right to select the "contingents to make a parade" (*id.*, 515 U.S. at 569-70), as well as those who lead the parade.

The New Jersey Supreme Court avoided this constitutional barrier as well, denying to the Boy Scouts the right to select the "contingents" constituting a Boy Scout troop, solely because, in the court's opinion, the Boy Scout Oath and Law had failed to "disseminate" to outsiders a concrete and specific-enough message "that homosexuality is immoral...." *See* N.J. Op., p. 64a. According to Hurley, however, it is not for the courts or any other government official to grant or deny First Amendment rights just because, in their eyes, the Boy Scouts do not disseminate a "particularized message" on homosexuality. It is enough that the Boy Scouts have made it clear that they do not wish even to suggest that homosexuality is moral. *See* Hurley, *supra,* 515 U.S. at 574-75.

The New Jersey courts below undoubtedly misapplied Hurley, opting instead to apply an entirely different set of rules governing "freedom of association" purportedly derived from a trilogy of this Court's opinions: Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); and New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988). The court's reliance upon those cases also was error.

II. THE DECISION BELOW VIOLATES THE RIGHT TO ASSEMBLE PROTECTED BY THE FIRST AMENDMENT.

Not once, in its analysis of First Amendment issues, did the New Jersey Supreme Court assess the constitutionality of the application of its state's public accommodation law in light of the text or history of that Amendment. To the contrary, the court below examined only certain substitute phrases such as the "freedom of intimate association" and the "freedom of expressive association" found in selected, recent decisions of this Court. Having failed to address the First Amendment issues according to the relevant constitutional text and history, and having limited its consideration to only three of this Court's precedents, all decided since 1984, and having even misapplied those three precedents, the court failed to address the First Amendment issues truly presented in this case.

A. Roberts, Rotary Club, and New York State Club Do Not Apply to This Case.

In its discussion of the Boy Scouts' First Amendment claim, the court below relied exclusively upon the Roberts, Rotary Club, and New York State Club cases, cited above. Not once, however, did the court acknowledge that those cases explicitly apply to First Amendment claims made by organizations that have been found by the courts to be commercial in nature and purpose. *See* Roberts, *supra*, 468 U.S. at 616 ("[T]he court ... concluded that the Jaycees organization is a 'business'..."); Rotary Club, *supra*, 481 U.S. at 542 (The state courts found that both the International Rotary and local Rotary Clubs were "business establishments" within the meaning of state law.); New York State Club, *supra*, 487 U.S. at 5 (The New York City Human Rights Law private club exception limited to clubs unrelated to "the business and

professional life of the city"). Having failed to find that the Boy Scouts are commercial in purpose and nature, the New Jersey Supreme Court misapplied the Roberts, Rotary Club and New York State Club precedents.

B. Freedom of Association is Not Limited to Intimate and Expressive Associations.

Additionally, the court below failed to recognize the full scope of the constitutional right of association, erroneously limiting its examination of that right to the Roberts trilogy of cases. The New Jersey justices placed primary reliance on this Court's opinion in Roberts v. United States Jaycees, *supra,* 468 U.S. at 622, wherein this Court identified the First Amendment "right of association" "as **implicit** in the right to engage in activities protected by" that Amendment. (Emphasis added.) Thus, this Court, in Roberts, treated "the right of association" as "**correlative**" to such express rights as "freedom to speak, to worship and to petition the government for redress of grievances...." *Id.* (Emphasis added.) As a "correlative" right, some lower courts, citing Roberts, have **insisted** that any person who claims a First Amendment constitutional right to associate **must** either claim and prove his right to an "intimate association" **or** must demonstrate that the association is for "expressive purposes." *See, e.g.*, Sanitation and Recycling Industry, Inc. v. City of New York, 107 F. 3d 985, 996 (2d Cir. 1997); Griffin v. Strong, 983 F. 2d 1544, 1546 (10th Cir. 1993); Winik-Nystrup v. Manufacturers Life Insurance Co., 8 F. Supp. 2d 1, 10-23 (D. Conn. 1998). That is precisely what the New Jersey Supreme Court did in this case.

In a section of the opinion below, labeled "Freedom of Expressive Association," the New Jersey justices conducted their First Amendment analysis of the Boy Scout policy with

respect to open, avowed homosexuals **solely** in relation of that policy to the "dissemination" of the Boy Scout message:

> We find that the LAD [Law Against Discrimination] does not violate Boy Scouts' freedom of expressive association because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views. The organization's ability to **disseminate** its message is not significantly affected by Dale's exclusion because Boy Scout members do not associate for the purpose of **disseminating** the belief that homosexuality is immoral; Boy Scouts discourages its leaders from **disseminating any** views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect to homosexuality. [N.J. Op., p. 52a (emphasis added).]

Within this framework of analysis, the New Jersey court dismissed the petitioners' claim that the Boy Scout Oath and Law require the exclusion of avowed homosexual Scoutmasters because the Oath and Law do not "on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." N.J. Op., p. 56a. Finding that "no single view" on the "subject" of sexual morality "functions as a unifying associational goal of the organization," the court held that requiring the Boy Scouts to welcome an open, avowed homosexual scoutmaster into its ranks "does not violate Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes.' Rotary Club, *supra*, 481 U.S. at 548...." N.J. Op., p. 56a.

Having limited its analysis of the Boy Scouts' claim of freedom of association to its "correlative" roles recognized in the Roberts and Rotary Club cases, the New Jersey court failed to abide by this Court's long line of cases recognizing a constitutional right of freedom of association **independently** rooted in "the right of the people peaceably to assemble," as expressed in the First Amendment and understood by America's founders.

In the seminal case of DeJonge v. Oregon, 299 U.S. 353, 364 (1937), this Court ruled that the right of the people peaceably to assemble was "a right **cognate** to those of free speech and free press and is **equally** fundamental." (Emphasis added.) As an "equal and cognate" right, the Court affirmed its earlier observation in United States v. Cruikshank, 92 U.S. 542, 552 (1876), that the right of the people to assemble was the right of "'citizens to meet peaceably **for consultation** in respect to public affairs....'" *Id.* (Emphasis added.) Thus, this Court embraced the historic understanding that the foundational purpose of the right of the people peaceably to assemble was to "**consult** for their common good." Article XVI of the August 16, 1776 Constitution of Pennsylvania reprinted in Sources of Our Liberties 331 (Perry, ed., American Bar Foundation, 1972) (emphasis added).

C. Freedom of Association Includes the Right of Like-Minded People to Join in a Common Cause.

Two years after the DeJonge decision, in Hague v. CIO, 307 U.S. 496 (1939), Justice Owen Roberts, in an opinion concurred in by Justice Hugo Black, engaged in an extensive review of the nature and application of the right of the people peaceably to assemble. First, in posing the question before the Court, Justice Roberts made clear that the issue of peaceable assembly related to "**dissemination** [of] information [about]

and **discussion** of the [National Labor Relations] Act, and of the opportunities and advantages offered by it...." *Id.*, 307 U.S. at 512 (emphasis added). Second, relying on Cruikshank, *supra,* Justice Roberts linked the labor act's policy of "freedom of association" to the constitutional "right peaceably to assemble and to **discuss** ... and **communicate**...." *Id.*, 307 U.S. at 512-13 (emphasis added). Finally, Justice Roberts reached his conclusion, often referred to and relied upon by this Court up to the present day:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, **communicating** thoughts between citizens and **discussing** public questions. [*Id.*, 307 U.S. at 515 (emphasis added).]

Justice Roberts' understanding of the consultative purpose of the people's right of assembly not only conformed to this Court's "right of association" cases in Cruikshank and De-Jonge, but also was a focus of this Court's freedom of association rationale in case after case prior to the decision in Roberts v. United States Jaycees, *supra*. Relying explicitly upon Justice Roberts' opinion in Hague, this Court ruled in Thomas v. Collins, 323 U.S. 516, 532 (1945), that "[t]he right to **discuss**, and **inform** people concerning the advantages and disadvantaged of unions and joining them is protected ... as part of free assembly" (emphasis added). Later, the Court returned to this theme, concluding that "the right either of workmen or of unions ... to assemble **and discuss their own affairs** is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and enlist the support of others." *Id.*, 323 U.S. at 539 (emphasis added).

In a series of cases involving the NAACP, this Court struck a similar note in its assessment of the purpose of the right of association. In NAACP v. Alabama, 357 U.S. 449, 460, 466 (1958), this Court, emphasizing the importance of protecting "the rights of [NAACP's] rank-and-file members to engage in lawful association in support of their common beliefs," whether they be "political, economic, religious or cultural," relied upon **both** the speech and the assembly clauses for its ruling that "the right of the members to pursue their **lawful private interests privately** and to associate with others in doing so ... come[s] within the protection of the Fourteenth Amendment" (emphasis added). In NAACP v. Button, 371 U.S. 415, 428, 431, 437, 444-45 (1963), this Court repeatedly treated freedom of "association" as a separate and distinct freedom from that of "expression." As for the former freedom, the Court observed that the Virginia rule against lawyer solicitation created "the gravest danger of smothering all **discussion** looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.*, 371 U.S. at 434-37 (emphasis added). Nineteen years later, in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909 (1982), this Court continued to recognize that the right to "assemble peaceably" was distinct from the freedom of speech, the former primarily protecting the right of the NAACP to "**discuss among themselves** their grievances against governmental and business policy." (Emphasis added.)

D. Freedom of Association Protects the Right of the Boy Scouts to Set Its Own Moral Standards.

To collapse this distinctive freedom of association into one of "expressive association," as the New Jersey courts did below, disregards these venerable authorities. By failing to utilize the traditional applications of the right to associate, independently grounded in the right of the people peaceably to

assemble, the Roberts and Rotary Club opinions unwittingly opened the door to the very government intrusions that the Assembly Clause was designed to prohibit. Instead of the people deciding with whom they will associate to discuss and advance common beliefs pertaining to "political, economic, religious or cultural matters," governments have been given license to impose their views of political, economic, religious and cultural orthodoxy, so long as they purport to do so in the cause of eliminating "invidious discrimination."

In his concurring opinion in Thomas v. Collins, *supra,* Justice Robert Jackson warned that the government would invent all kinds of reasons to intrude upon the right of the people to associate, but that the courts must remain vigilant to insure that the right of the people to assemble does not become a "hollow one." *Id.*, 323 U.S. at 547.

The Supreme Court of New Jersey opinion below illustrates the "hollowness" of a constitutional right of association if limited to the "correlative" right of freedom of association, recognized in the Roberts/Rotary Club/New York State Club line of cases. By focusing exclusively upon the "expressive" aspect of Scouting, the New Jersey judges were enabled to disregard completely the internal camaraderie of the organization, and thus to discard the essential role that common beliefs and attitudes must play to ensure freedom of association. *See* NAACP v. Button, *supra,* 371 U.S. at 429-31.

III. THE DECISION BELOW ERRONEOUSLY EXPANDS THE CONSTITUTIONALLY-PERMISSIBLE LIMITS ON FREEDOM OF ASSOCIATION.

A. Freedom of Association May Be Limited Only by Laws Protecting the Physical Peace.

According to the express language of the First Amendment's Assembly Clause, the **only** constitutionally-permitted condition that governments may impose upon the right of the people to assemble is that the assembly must be "peaceable." In its decision in DeJonge v. Oregon, *supra*, this Court overruled a criminal conviction under a state syndicalism act because there was not a scintilla of evidence of an "incite[ment] to violence and crime." By so ruling, this Court rejected the State's attempt to criminalize conduct simply because it occurred under the auspices of an organization which taught and advocated the violent overthrow of the government. As dangerous as such teaching was to the stability of the government, this Court stood firm in favor of "the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." *Id.*, 299 U.S. at 365.

Eight years after DeJonge, this Court explained further that any regulation, criminal or civil, limiting "orderly discussion and persuasion ... must have clear support in public **danger**":

> Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow **widest** room for discussion, the **narrowest** range for its

> restriction, particularly when this right is exercised in conjunction with **peaceable** assembly.... [In this case], [t]he assembly was entirely peaceable ... [and] involved no element of clear and present, grave **and immediate danger to the public welfare**. [Thomas v. Collins, *supra,* 323 U.S. at 530, 536 (emphasis added).]

By demanding explicit proof of breach, or imminent threat of breach, of the **physical** peace in DeJonge and Thomas v. Collins, this Court forged a legacy of constitutional protection for the freedom of assembly and association that prevailed throughout the civil rights movement of the 1960's. Thus, in Cox v. Louisiana, 379 U.S. 536, 538-52 (1965), this Court struck down a conviction under a "breach of the peace" statute because there was no evidence of any threat to the physical peace of the community. In the same case, this Court struck down a conviction under an "Obstructing Public Passages" statute because of evidence that it had been enforced in a discriminatory manner inconsistent with this Court's insistence upon a viewpoint-neutral policy of "time, place and manner." *Id.*, 379 U.S. at 553-58.

This Court has required **real** evidence of a threat to the community's physical well-being, not only in cases applying criminal statutes to **public** assemblies, but also in civil statutes applied to private associations. In NAACP v. Alabama, *supra*, 357 U.S. at 465, the Court rejected Alabama's effort to obtain the membership list of the Alabama chapter of the NAACP, distinguishing an earlier decision approving a New York law requiring disclosure of membership in the Ku Klux Klan on the ground that "the Klan's activities ... involv[ed] acts of unlawful intimidation and violence."

Beginning in the 1960's, however, and continuing to the present day, this Court has sometimes departed from this very narrow test of constitutional permissibility, applying a broader, more flexible test, namely, whether "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." NAACP v. Button, *supra*, 371 U.S. at 438.

B. The Compelling State Interest Test Should Have No Legitimate Role in Deciding This Case.

Application of the "compelling state interest" test, first formulated and applied by this Court in equal protection cases, has been, and continues to be controversial. As early as 1969, Justice John Marshall Harlan cautioned this Court to use the test only in cases involving race discrimination. Shapiro v. Thompson, 394 U.S. 618, 658-62 (1969) (Harlan, J., dissenting).

More recently, Justice Anthony Kennedy has voiced concern about the indiscriminate use of the compelling state interest test in First Amendment cases. In his concurring opinion in Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991), Justice Kennedy reminded the Court, as had Justice Harlan before him, that the compelling state interest test "derives from our equal protection jurisprudence ... and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from considerations of time, place, and manner of use of public forums." *Id.*, at 124. In a case decided upon the heels of Simon & Schuster, Justice Kennedy reiterated his concern, this time expressing his opinion that "our adoption of the compelling-interest test was accomplished by accident ... and as a general matter produces a misunderstanding that has

the potential to encourage attempts to suppress legitimate expression." Burson v. Freeman, 504 U.S. 191, 212 (1992) (Kennedy, J., concurring).

Justice Kennedy has not been the only voice expressing such concerns. In Roberts v. United States Jaycees, *supra*, 468 U. S. at 633, Justice Sandra Day O'Connor questioned this Court's "mechanical application of a 'compelling interest' test," and stated that the "First Amendment is offended by direct state control of the membership of a private organization engaged exclusively in protected expressive activity...." *Id.*, at 638. Referring to, *inter alia*, The Official Boy Scout Handbook, Justice O'Connor noted that "[e]ven the training of outdoor survival skills, or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.*, at 636. Freedom of association for such expressive associations, like the freedom of speech, should only be governed by "content-neutral state regulation of the time, place, and manner of any organization's relations with its members or with the State," and only then when such regulations are "'narrowly drawn' to serve a 'sufficiently strong, subordinating interest' 'without unnecessarily interfering with First Amendment freedoms.'" *Id.*, 468 U.S. at 634.

Finally, as discussed above, this Court unanimously eschewed application of the compelling state interest test in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), relying instead upon the absolute principle of "speaker autonomy" to turn back an attempt to use the Massachusetts public accommodation law to overlook the freedom of speech in the name of "eradicating discrimination." In doing so, the Court deliberately refused to follow the lead of

the lower court, which had applied the compelling state interest test on the authority of the Roberts case. *Id.*, 515 U S. at 563.

Had this Court done otherwise in Hurley, it would have been drawn into the kind of balancing of interests engaged in by the New Jersey Supreme Court below. After finding that the petitioners enjoyed the constitutional right of expressive association, the New Jersey justices opined that "[t]he right of expressive association must ... be weighed against" the compelling interest of the state to prevent "invidious discrimination" in each case. This probe led the state court, in turn, to determine the purpose of the Boy Scouts and the meaning of the Boy Scout Oath and Law, rather than to defend the right of the Boy Scouts to determine those for itself, thereby trampling on the very constitutional "autonomy" expressed and applied by this Court in Hurley.

C. The Compelling State Interest Test Was Used in This Case to Enforce Viewpoint Discrimination.

The compelling state interest test also led the New Jersey justices into a probing critique of the Boy Scouts' views on homosexuality, labeling them "archaic," "stereotypical" and "bigoted." N.J. Op., p. 62a. In contrast, the justices enthusiastically embraced the New Jersey legislature's views of homosexuality, or other similar sexual or affectional orientation, as enlightened and commendable — a "recognition that discrimination based on 'archaic' and 'stereotypical notions' about homosexuals that bears no relationship to reality...." N.J. Op., p. 62a.

Only by relying upon the compelling state interest test could the New Jersey Supreme Court have justified a law that infringed upon the right of the Boy Scouts to hold views contrary to a state-imposed orthodoxy. Such viewpoint

discrimination has been found by this Court to be *per se* a violation of the First Amendment. *See* Rosenberger v. University of Virginia, 515 U.S. 819 (1995). Yet, the compelling state interest test inevitably leads to such discrimination when applied to a law designed to prohibit certain acts of discrimination by an organization dedicated to views considered anathema by the state.

This failure of the compelling interest test to protect legitimate constitutional rights has led one astute observer to remark that "the ... test permits courts to render decisions based upon vague ideological commitments that have no basis in the Constitution." Bernstein, "Sex Discrimination Laws Versus Civil Liberties," 99 *The Univ. of Chi. L. Forum* ___ (1999).

The unconstitutionality of the compelling interest test is revealed by New Jersey Supreme Court Justice Handler's concurring opinion. Applying that test as set forth in Roberts, Justice Handler declared that the state had a compelling interest to prohibit organizations from using "stereotypical assumptions about homosexuals" in determining its standards for membership:

> One particular stereotype that we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of **social science data** that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society.... Accordingly ... there is no reason to view "a gay scoutmaster, solely because he is a homosexual, [as lacking the] strength of character necessary to properly care for [and] impart BSA humanitarian ideals to the young boys in his charge." [N.J. Op., pp. 95a-96a (emphasis added).]

Armed with the compelling state interest broadax, Justice Handler chopped down 6,000 years of Judaeo-Christian tradition and moral teaching, tendentiously relying upon selected social science studies to support his revolutionary views which are out of step with the authoritative rulings of this Court.

Only 14 years ago, in Bowers v. Hardwick, 478 U.S. 186 (1986), this Court upheld a Georgia state law criminalizing homosexual sodomy. In his concurring opinion, Chief Justice Warren Burger observed that "[c]ondemnation of [homosexual] practices is firmly rooted in Judaeo-Christian moral and ethical standards."[4] *Id.*, 478 U.S. at 192-93. Moreover, the Chief Justice observed that even pre-Christian Roman law made "[h]omosexual sodomy ... a capital crime" and that Blackstone [in his *Commentaries*] had described it as 'the infamous crime against nature....'" *Id.*, 478 U.S. at 196-97.[5]

---

[4] The Scriptural condemnation of homosexuality is extensive. Both the Old and the New Testaments condemn it. "Thou shalt not lie with mankind, as with womankind; it is abomination." *Leviticus* 18:22. "But the men of Sodom were wicked and sinners before the Lord exceedingly." *Genesis* 13:13. "And turning the cities of Sodom and Gomorrah into ashes condemned them with an overthrow, making them an ensample unto those that after should live ungodly." *II Peter* 2:6. "[F]or even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly...." *Romans* 1:26-27.

[5] Even in Romer v. Evans, 517 U.S. 620 (1996), in which this Court struck down a Colorado constitutional initiative against the enactment of laws prohibiting discrimination against homosexuals, this Court carefully refrained from invoking its moral judgment in substitution for that of the people of Colorado, limiting its ruling to a narrow finding that the initiative had been the product of an unconstitutional "animus" against homosexuals as a class. *Id.*, 517 U.S. at 665-66.

Invoking the compelling state interest test, the majority opinion dismissed such views as "bigotry," not worthy of serious consideration. N.J. Op., p. 61a. Justice Handler invoked social science literature to defend his legal ruling, but in doing so he appears to have revealed his own prejudices, failing to cite even one study that might cast doubt on the result he so desired to reach. In reality, the literature reveals that the experts do not agree. Indeed, social science data other than that cited by Justice Handler confirm the wisdom of a content-neutral First Amendment test. Left out from his survey, for example, are Dr. Judith Reisman's findings that adult homosexuals are far more likely than adult heterosexuals to solicit teenaged sexual partners. "Partner Solicitation Language As A Reflection Of Male Sexual Orientation." Collected Papers from the NARTH Annual Conference, Saturday, 29 July 1995. In her analysis of "In Search Of" ("ISO") advertisements placed by males in two magazines, the *Washingtonian*, which is predominantly heterosexual in orientation, and *The Advocate*, which is predominantly homosexual, Dr. Reisman found that under 1 percent of *Washingtonian* ISO advertisers as against 53 percent of *Advocate* ISO advertisers sought teens. She also found that on average only once a month did advertisers in *Washingtonian* seek a teenage girl, while 15 percent of the advertisers in *The Advocate* sought an average of 130 boys per month. *Id.*

Dr. Reisman's findings are supported by studies conducted by the homosexual community. In *The Gay Report*, a survey of homosexual attitudes and behavior, homosexual researchers Jay and Young found that 73 percent of homosexuals surveyed had at some time had sex with boys 16 to 19 years of age or younger. K. Jay and A. Young, *The Gay Report* (New York: Summit Books, 1979), p. 275. Approximately one out of four homosexuals admitted to sex with children and younger teens. Jay and Young, p. 275; A.P. Bell and M.S. Weinberg, *Homo-*

sexualities: A Study of Diversity Among Men and Women (New York: Simon & Schuster, 1978), p. 85.

Pedophilia plays a key role in the development of future homosexuals. Noted sex researchers Masters and Johnson observed:

> In most instances, homophile interests developed in the early to midteens.... There was no history of overt heterosexual experience prior to homophile orientation. Recruitment usually was accomplished by an older male, frequently in his twenties, but occasionally men in their thirties were the initiators. When the homosexual commitment was terminated, in most instances, the relationship was broken by the elder partner. With termination, the teenager was left with the concept that whether or not he continued as an active homosexual, he would always be homophile-oriented. [W. Masters and V. Johnson, *Human Sexual Inadequacy* (Boston: Little, Brown and Company, 1970), pp. 179-180.]

In one study (Bell and Weinberg, *supra*, p. 87), over 60 percent of the respondents identified their first homosexual partner as someone older; in another (P. Gephard and A.P. Johnson, *The Kinsey Data: Marginal Tabulations of the 1958-63 Interviews Conducted by the Institute for Sex Research* (Indiana University Press: Bloomington, Ind., 1979), p. 495, over 64 percent of the respondents identified their first homosexual partner as having initiated the sexual experience.

While Justice Handler and his New Jersey colleagues may have assumed that the homosexual lifestyle is "moral," it is difficult to know what standard was used. The promiscuous, reported behavior of many homosexuals could hardly be

considered moral. In a 1978 study by Bell and Weinberg, *supra*, 83 percent of active homosexuals had 50-plus partners, 73 percent had 100-plus partners, 58 percent had 250-plus partners, 41 percent had 500-plus partners and 26 percent had 1000-plus partners. Seventy percent of white homosexuals claimed that a majority of their sexual contacts were one-time encounters.

Gallup reported one study showing that more than 80 percent of promiscuous homosexual males admitted to having had sex with minors. Additionally, he reported that proportionally there are more homosexual pedophiles than heterosexual. G. Gallup, "Attitudes, etc." *Ethology and Sociobiology, supra,* at 281-84. Patrick Boyle has documented stories of numerous men whose first sexual encounter was with an adult male and who, having reached adulthood, in turn enticed a young boy into having sex with him. P. Boyle, *Scout's Honor*, *supra*, at 28.

During the period 1971 through November 1991, the Boy Scouts banned 1,871 individuals from Scouting for sexual abuse. P. Boyle, *Scout's Honor*, *supra*, at 315. (Not all of these cases involved male scout leaders abusing male Scouts.) At least 2,071 Scouts reported being abused by leaders, with another 2,737 victims who may or may not have been Scouts. *Id.*, at 316. It could be said that based on their experience as well as the social science literature, the Boy Scouts would be violating the trust conferred on them by the parents of countless young boys if they allowed avowed homosexuals to continue in leadership roles, modeling their lifestyle to those impressionable boys, resulting in behavior by those boys which the Boy Scout Oath and Law seek to avoid.

D. Only a Narrowly and Precisely Drawn Time, Place and Manner Test Protects Associational Rights.

With such scientific literature as this, it is not for judges, much less state legislatures, to survey the sociological studies on homosexuality and then, in pursuit of some ideal society without discrimination, force people to associate with each other only in conformity with the views endorsed by the civil authorities. Nor is it meet for judges to dismiss as "bigotry" or "prejudice" any view of homosexuality that does not square with their own. Civilly-enforced associational conformity is the very evil that the Assembly Clause was designed to prevent, guaranteeing to the people the right to decide with whom they will associate so long as they conduct themselves in a manner that is consistent with the physical peace of the community.

During the 1950's and 1960's, this Court was called upon again and again to declare and apply the First Amendment to speeches, assemblies and petitions of people who actively opposed the racial views held by civil authorities in the South. During those tumultuous times, this Court applied content-neutral constitutional principles that did not permit it or any other court to take sides in the ongoing political debate. Rather, as in Edwards v. South Carolina, 372 U.S. 229, 235 (1963), it held the constitutional line protecting "free speech, free assembly and freedom to petition for redress of ... grievances ... in their most pristine and classic form." This Court did so because it adhered to the original principles of content neutrality unencumbered by the compelling state interest test that invites an open-ended balancing of governmental interests against those of the individual.

This case presents to this Court an excellent opportunity to reject the compelling state interest test as having no permanent

place in its First Amendment jurisprudence, and to replace it with time-honored, content-neutral principles permitting the state to regulate people's assemblies only on the basis of precisely and narrowly drawn time, place and manner restrictions.

E. Laws Against Discrimination Must Not Be Allowed to Trump Important Civil Liberties.

At the height of the civil rights movement in the 1960's and into the 1970's, when this Court was faced with constitutionally-based claims of right to be served in restaurants without regard to race, liberal-minded Justices of this Court, including William O. Douglas, Arthur Goldberg, Hugo L. Black, and Thurgood Marshall rejected the notion that it was for government to forcibly conform America in the name of eliminating racial prejudice . *See* Bell v. Maryland, 378 U.S. 226, 313, 345 (1964) (Goldberg, J., concurring and Black, J., dissenting); Palmer v. Thompson, 403 U.S. 217, 238 (1971) (Douglas, J., dissenting); and Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 180 (1972) (Marshall, J., joining Justice Douglas dissent). Since those heady days, the path of equal protection has led the nation to the exaltation of a utopian egalitarianism that threatens to "trump ... civil liberties." Bernstein, "Sex Discrimination Laws Versus Civil Liberties," *supra,* 99 *Univ. of Chi. L. Forum* at ___.

Even the homosexual community has recognized that if the New Jersey court opinion is upheld, it will threaten their right to set their standards for their own organizations which discriminate against "straights." *See* R. Sincere, "New Jersey Supreme Court Ruling on Boy Scouts Threatens Freedom for All — Including Gays," *Wall Street Journal* (August 11, 1999) Independent Gay Forum, www.indegayforum.org/articles/sincere1.html. *See* also N. Ashford, "Equal Rights, Not Gay

Rights," Independent Gay Forum, www.indegayforum.org/articles/ashford7.html.

By upholding the right of the Boy Scouts of America to set its own moral standards, this Court will insure that **all** groups of like-minded Americans may freely associate with one another without government intrusions based upon a state-imposed orthodoxy of opinion.

CONCLUSION

For the reasons set forth above, Public Advocate of the United States, Lincoln Institute for Research and Education, Committee to Protect the Family Foundation, Concerned Women for America, and National Criminal Justice Council respectfully urge this Court to reverse the decision of the Supreme Court of New Jersey.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for *amici curiae*
* *Counsel of Record*
February 28, 2000